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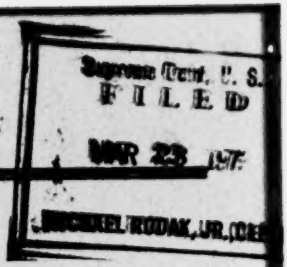

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-6021

VERNON "DOC" CREWS,
AND JOHN BLAIR

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

REPLY

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REPLY

Petitioners, Vernon "Doc" Crews and John Blair, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered as a corrected opinion on June 28, 1972 and denial of Petition for Rehearing entered without opinion on November 10, 1972.

(a) JURISDICTION

Jurisdiction of this Court is invoked under the provisions of Rule 19 (b) of the Supreme Court Rules specifically that the Court below has rendered a decision in conflict with the decision of another Court of Appeals on the same matter and a decision of this Court on the same matter, and has decided an important question of Federal Law which has not been, but should be settled by this Court.

The judgment of conviction was entered in the United States District Court on July 9, 1970. The opinion sought to be reviewed was entered June 28, 1972 (a copy is appended as Exhibit "A"). The order denying rehearing was entered November 10, 1972 (a copy is appended as Exhibit "B"). Order extending time for filing Petition for Writ of Certiorari was entered December 12, 1972 (a copy is appended in Exhibit "C").

The statutory provision believed to confer jurisdiction to review the foregoing judgment and opinion is Title 28, Section 1254 (1).

(b) QUESTIONS PRESENTED FOR REVIEW

I

IS THE IMPLEMENTATION OF A JURY SELECTION PLAN WHICH SYSTEMATICALLY EXCLUDES YOUNG ADULTS 21-25 YEARS OF AGE AND CITIZENS OF CUBAN ORIGIN, VALID.

II

IS THERE A DENIAL OF THE RIGHT TO COUNSEL WHEN THE COURT ORDERED ONE ATTORNEY TO REPRESENT TWO DEFENDANTS OVER OBJECTION.

ARGUMENT

I

IS THE IMPLEMENTATION OF A JURY SELECTION PLAN WHICH SYSTEMATICALLY EXCLUDES YOUNG ADULTS 21-25 YEARS OF AGE AND CITIZENS OF CUBAN ORIGIN, VALID.

The ultimate aim of the Jury Selection and Service Act of 1968 for a representative cross section of the community could be obtained by a proper application of the guidlines set down for the enactment of a satisfactory "plan". However, the implementation of the "plan" has created an absolute elimination of two distinct segments of the community which have been unnecessarily excluded from the rolls.

The Act (28 U.S.C.A. Sec 1867 (1) (4) provided the clerk with the means of updating the Master Wheels by ordering additional names to be placed in the Wheels from time to time as necessary. It would appear that the purpose of the system is to provide some flexibility to the selection of jury lists so as to provide an adequate selection if new names became necessary. The government begs the question by relying upon the "practical problems of administration". To permit segments of society to be excluded by omission when the machinery created permits their

inclusion does violence to the very vitality of the act itself. The rights of citizens to sit on juries and the rights of defendants to a representative jury certainly outweighs "practical problems".

The government points out that there is no requirement that every group have proper representation in the jury pool, only that there be no discriminatory exclusion. Simmons v. United States, 406 F 2d 456 (C.A. 5th, 1969) cert. den. 395 U. S. 982. However, the knowledge of the naturalization laws and the disproportionate increase in one specific segment of society creates a discriminatory exclusion. This point is further strenghtened by Title 28 Sec. 1862, which specifically prohibits an exclusion from service as a grand or petit juror on the basis of "national origin".

The government fails to recognize the distinction between representation of every group in the jury pool - and the impossibility of representation by systematic, absolute exclusion resulting from the method of implementation of the plan.

It is a fact that no young adult can reach a federal jury in the Southern District of Florida.

It is a fact that citizens who have come over Post-Castro can not sit on a federal jury in the Southern District of Florida.

II

IS THERE A DENIAL OF THE RIGHT TO COUNSEL WHEN THE CCURT ORDERED ONE ATTORNEY TO REPRESENT TWO DEFENDANTS OVER OBJECTION.

Petitioner Blair stated to the court that he wished counsel to be appointed in his behalf. The court appointed the same counsel then representing co-defendant, Crews. The appointment was accompanied by counsel relating to the court the possibility of a conflict of interest of the two defendants.

In Glasser v. U. S., 315 U. S. 60, 62 S. Ct. 457, 86 L Ed. 680 (1942) the counsel for defendant Glasser also represented his co-defendant Kretske. Counsel objected in the same manner as did counsel in the case at bar, pointing out the "possibilities of the inconsistent interests of Glasser and Kretske". The appointment of counsel requires specific safeguards to preserve the rights of the defendant.

> "[T]he 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

The government states that no prejudice was shown by petitioners. Glasser, supra, alleged prejudice but the court specifically stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow counts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78, L. Ed. 674, 90, A.L.R. 575; Tumey v. Ohio, 273 U. S. 510, 535, 41 S. Ct. 437, 445, 71 L. Ed. 749 50 A.L.R. 1243; Patton v. United States, 281 U. S. 276, 293, 50 S. Ct. 253, 256, 74 L Ed. 854, 70 A. L. R. 263.

The government claims that the plea of nolo contendere waives the issue of ineffective assistance of counsel. The decision of petitioners to plead in this manner was decided after the appointment of counsel and factors contributing to the plea are not a part of the record. To find a waiver by such a plea would be to deprive the petitioners of the fundamental right of assistance of counsel.

Furthermore, the effect of a plea of nolo contendere permitting review of only the sufficiency of the indictment is not inflexible and exceptional circumstances will be considered. The right of assistance of counsel is a fundamental right and deprivation of the right is an exceptional circumstance.

> "This is one of the safeguards *** deemed necessary to insure fundamental human rights of life

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and liberty and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson v. Zerbst, 304 U. S. 458, 462, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461."

CONCLUSION

We respectfully urge that the writ be issued so the case may be reviewed on the merits.

Respectfully submitted,

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BY: _____
MILTON E. GRUSMARK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon opposing counsel this 21st day of March, 1973.

_____
MILTON E. GRUSMARK